Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO W–02–281 OF 1999 AND NO W–02–344 OF 1999

GOPAL SRI RAM AND HAIDAR JJCA AND AZMEL J

5 APRIL 2001

Civil Procedure *— Judgment — Delay in delivering judgment — Effect on trial judge's views*

Civil Procedure *— Particulars — Application for particulars not heard and determined by court — High Court's failure to hear and determine appellant's application — Whether most serious and fundamental miscarriage of justice occasioned thereby — Detrimental effects on appellant — — Appellant's legitimate expectation to have his application heard and determined*

Civil Procedure *— Pleadings — Facts not pleaded — Defendants having to meet unpleaded charges of negligence — Whether prejudice thereby caused — Approach plaintiff should have adopted*

Evidence *— Witness — Expert witness — Whether permissible for expert witness to study notes of evidence to ascertain nature of evidence given*

Professions *— Medical practitioners — Negligence — Standard of care — Test of 'ordinary skilled man exercising special skill' — The 'Bolam' standard — Reasons for maintaining the 'Bolam' standard*

Tort *— Negligence — Causation — Burden of proving causation, on whom*

Foo Fio Na (the first respondent in Civil Appeal No W–02–281–1999) had successfully sued Dr Soo Fook Mun ('Dr Soo') (the appellant in Civil Appeal No W–02–281–1999) and Hospital Assunta ('the Hospital') (the second respondent in Civil Appeal No W–02–281) in negligence in the High Court at Kuala Lumpur (see *Foo Fio Na v Hospital Assunta & Anor* [1999] 6 MLJ 738). The gist of her claim was that she suffered paralysis because of Dr Soo's alleged negligence. Dr Soo (vide Civil Appeal No W–02–281) and the Hospital (vide Civil Appeal W–02–344–1999) both appealed to the Court of Appeal. The Court of Appeal in determining both appeals inter alia dealt with the following issues: (i) whether the failure of the High Court to hear and determine Dr Soo's summons for particulars had occasioned a miscarriage of justice; (ii) whether causation had been established; (iii) the effect of the High Court judge's four year delay in delivering judgment; (iv) whether the appellants had been prejudiced by having to meet unpleaded charges of negligence; (v) whether it was proper for Dr Soo's expert to give evidence after reading the plaintiff's evidence and that of her expert during the trial; and (vi) the standard of proof of medical negligence.

Held, allowing both Dr Soo's and the Hospital's appeals:

(1) Nothing is clearer in adjectival law than a litigant's right to have his interlocutory applications heard and dealt with. In the present case, Dr Soo had a legitimate expectation to have his application for particulars heard and determined according to law. If he was unhappy with any decision made in respect of his application, he was entitled to appeal. The failure of the High Court to hear and determine Dr Soo's application for particulars therefore occasioned a most serious and fundamental miscarriage of justice. It not only deprived him of his basic right to have his application heard but it also deprived him of the substantive and valuable right to appeal against any decision made against him. By refusing to determine his application the High Court effectively precluded him from going further: no decision and so no appeal. The way in which the case was handled by the trial judge was an extreme example of procedural unfairness and oppression (see p 201A–D).

(2) During the trial a far more wide-ranging attack of an unpleaded case of negligence was raised against Dr Soo and the Hospital. Both Dr Soo and the Hospital suffered serious prejudice by reason of having to meet the unpleaded charges of negligence. Though counsel for the plaintiff sought to defend his position by relying on the usual difficulty that a plaintiff in a medical negligence case faces in trying to prove negligence against a doctor, in the instant case, the plaintiff had the benefit of the advice of the expert called by her. It was therefore open to her in the usual way to administer interrogatories to the defendants to ascertain what, if anything, had been done wrong during the surgery. The plaintiff could not complain for the failure of her solicitors to resort to the several procedural lines of attack provided to a litigant by rules of court (see pp 206F–207A).

(3) The plaintiff's case had to do with causation and the burden of proving causation remained throughout with the plaintiff. However the plaintiff's medical evidence when placed at the highest merely rendered uncertain the cause for her tragic condition. The written judgment delivered some four years after the conclusion of the trial did not also contain any direction on the burden of proof of causation that lay upon the plaintiff (see pp 202F, 205B, E–F).

(4) A long delay in delivering judgment, such as the four year delay in the instant case, has the effect of diminishing the weight that the Court of Appeal normally lends to the views upon the credibility of witnesses made by a trial court. The longer the delay in delivery of a judgment after trial, the less weight the views of the trial judge are entitled to (see p 205H–I).

(5) It is a common occurrence for experts on one side to be present in court during the evidence of the other side. This is to enable the

expert not only to advice counsel during cross-examination but also to comment on the expert evidence of the other side when he in turn gives evidence. It avoids surprise and delay. If for any reason, an expert is unable to be present when the other side is giving evidence, it is perfectly proper for him or her to later study the notes of the evidence to ascertain the nature of the evidence given (see p 207B–D).

(6) The test on the standard of proof of medical negligence that has always been used in the Malaysian jurisdiction is the test formulated by McNair J in *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582* ('the *Bolam* test'). The Court of Appeal ought not to alter the approach for two reasons. Firstly, as a matter of precedent it is not open to the Court of Appeal as an intermediate court of appeal to alter the law as that is a function reserved for the apex court. Secondly, as a matter of practical justice, the *Bolam* test places a fairly high threshold for a plaintiff to cross in an action for medical negligence and it is right that it be so. If the law played too interventionist a role in the field of medical negligence, it will lead to the practice of defensive medicine. The cost of medical care for the man on the street would become prohibitive without being necessarily beneficial. For the time being, the *Bolam* test maintains a fair balance between law and medicine (see pp 207E, 208A–B).

Obiter:

(1) There may be particular cases where an inference of causation may be readily drawn against a defendant warranting an explanation from him. In those circumstances, it may be entirely proper for the court to look to the defendant for a reasonable explanation negativing causation. This is not a rule of law but a mere rule of common sense (see p 202F–G).

(2) In practice one finds it most difficult to get one doctor to testify against another. In fact it is a matter of notorious repute that doctors in this country make the most reluctant witnesses against their brethren (see p 206H).

[Bahasa Malaysia summary

Foo Fio Na (responden pertama dalam Rayuan Sivil No W–02–281–1999) berjaya mendakwa Dr Soo Fook Mun ('Dr Soo') (perayu dalam Rayuan Sivil No W–02–281–1999) dan Hospital Assunta ('Hospital tersebut') (responden kedua dalam Rayuan Sivil No W–02–281) untuk kecuaian di Mahkamah Tinggi Kuala Lumpur (lihat *Foo Fio Na v Hospital Assunta & Anor* [1999] 6 MLJ 738). Intisari tuntutannya adalah bahawa beliau mengalami kelumpuhan disebabkan kecuaian Dr Soo yang didakwa. Dr Soo (lihat Rayuan Sivil No W–02–281) dan Hospital tersebut (lihat Rayuan Sivil W–02–344–1999) kedua-duanya

merayu ke Mahkamah Rayuan. Mahkamah Rayuan, dalam memutuskan kedua-dua rayuan antara lain mempertimbangkan isu-isu berikut: (i) sama ada kegagalan Mahkamah Tinggi membicarakan dan memutuskan saman untuk butir-butir Dr Soo merupakan satu ketidakadilan; (ii) sama ada sebab mengapa terjadinya kejadian tersebut telah dibuktikan; (iii) kesan kelewatan empat tahun oleh hakim Mahkamah Tinggi dalam menyampaikan penghakiman; (iv) sama ada pemohon-pemohon telah dimudaratkan dengan diminta menghadapi dakwaan kecuaian yang tidak diakui; (v) sama ada ia mengikut aturan bagi pakar Dr Soo memberikan keterangan setelah membaca keterangan plaintif dan pakarnya semasa perbicaraan; dan (vi) piawai pembuktian kecuaian perubatan.

Diputuskan, membenarkan rayuan kedua-dua Dr Soo dan Hospital tersebut:

(1) Tiada yang lebih jelas dalam undang-undang adjektival daripada hak litigan agar permohonan interlokutorinya dibicarakan dan dipertimbangkan. Dalam kes ini, Dr Soo mempunyai harapan sah agar permohonan butir-butirnya dibicarakan dan diputuskan menurut undang-undang. Sekiranya beliau tidak puas hati dengan apa-apa keputusan yang dibuat mengenai permohonannya, beliau berhak merayu. Kegagalan Mahkamah Tinggi membicarakan dan memutuskan permohonan untuk butir-butir Dr Soo merupakan satu ketidakadilan yang serius dan asasi. Ia bukan hanya menafikan hak asasinya untuk membicarakan permohonannya tetapi ia juga menafikannya hak merayu yang begitu penting dan berharga untuk menentang apa-apa keputusan yang dibuat terhadapnya. Dengan enggan memutuskan permohonannya Mahkamah Tinggi secara berkesan telah menghalang beliau dari meneruskan tindakannya: tiada keputusan, oleh itu tiada rayuan. Cara kes ini dikendalikan oleh hakim perbicaraan ialah satu contoh ketidakadilan prosedural dan penindasan yang keterlaluan (lihat ms 201A–D).

(2) Semasa perbicaraan, satu serangan yang berbidang jauh lebih luas atas kes kecuaian yang tidak diakui dikemukakan terhadap Dr Soo dan Hospital tersebut. Kedua-dua Dr Soo dan Hospital tersebut mengalami kemudaratan yang serius kerana terpaksa menghadapi dakwaan kecuaian yang tidak diakui. Walaupun peguam plaintif cuba mempertahankan kedudukannya dengan bergantung kepada alasan kesukaran yang biasa dihadapi oleh plaintif dalam kes kecuaian perubatan menentang seorang doktor, dalam kes pertama, plaintif mendapat manfaat khidmat nasihat pakar yang diundang beliau. Oleh itu, beliau mempunyai kebebasan seperti biasa untuk mentadbirkan soal-siasat atas defendan-defendan untuk memastikan apa, jika ada, yang telah dilakukan secara salah ketika surgeri tersebut. Plaintif tidak dapat mengadu atas kegagalan peguamnya menurut beberapa garis panduan prosedur

yang diberi kepada seorang litigan melalui peraturan-peraturan mahkamah (lihat ms 206F–207A).

(3) Kes plaintif adalah mengenai isu sebab mengapa terjadinya kejadian tersebut dan beban pembuktian sebab tetap ada pada plaintif. Walau bagaimanapun, keterangan perubatan plaintif apabila diletakkan di kedudukan tertinggi hanyalah menyebabkan tidak pastinya sebab bagi keadaannya yang tragik. Penghakiman bertulis yang disampaikan kira-kira empat tahun selepas berakhirnya perbicaraan tersebut juga tidak mengandungi apa-apa arahan mengenai beban pembuktian sebab yang ada pada plaintif (lihat ms 202F, 205B, E–F).

(4) Kelewatan yang lama dalam menyampaikan penghakiman, seperti kelewatan empat tahun dalam kes pertama, mempunyai kesan mengurangkan kepentingan yang lazimnya diberikan oleh Mahkamah Rayuan kepada kebolehpercayaan saksi-saksi di mahkamah bicara. Lebih lama kelewatan dalam menyampaikan penghakiman selepas perbicaraan, bertambah kurang kepentingan yang diletakkan pada pendapat-pendapat hakim perbicaraan (lihat ms 205H–I).

(5) Ia kejadian lazim bagi pakar dari satu pihak hadir di mahkamah ketika keterangan diberikan oleh pihak yang lagi satu. Ini adalah untuk membolehkan pakar bukan hanya menasihati peguam ketika pemeriksaan balas, tetapi juga memberikan komen mengenai keterangan pakar pihak yang lagi satu apabila beliau memberikan keterangan. Ini mengelakkan kekejutan dan kelewatan. Jika demi apa-apa alasan, seseorang pakar itu tidak dapat hadir apabila pihak yang lagi satu memberikan keterangan, ia mengikut aturan baginya menelaah nota-nota keterangan untuk memastikan jenis keterangan yang diberikan (lihat ms 207B–D).

(6) Ujian piawai pembuktian kecuaian perubatan yang digunakan oleh bidangkuasa Malaysia ialah ujian yang dirumuskan oleh McNair J dalam *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 ('ujian *Bolam*'). Mahkamah Rayuan tidak harus mengubah pendekatan tersebut demi dua alasan. Pertama, disebabkan duluan Mahkamah Rayuan sebagai mahkamah rayuan perantaraan tidak bebas mengubah undang-undang kerana itu merupakan fungsi mahkamah yang tertinggi. Kedua, disebabkan keadilan praktikal, ujian *Bolam* mempunyai nilai ambang yang agak tinggi untuk dilepasi seseorang plaintif dalam satu tindakan kecuaian perubatan dan ini wajar dilakukan. Sekiranya undang-undang memainkan peranan yang terlalu banyak campurtangan dalam bidang kecuaian perubatan, ini akan mengakibatkan amalan perubatan defensif. Kos penjagaan perubatan orang kebanyakan akan bersifat pencegahan tanpa menjadi semestinya bermanfaat. Buat ketika ini, ujian *Bolam* mengekalkan keseimbangan di antara undang-undang dan perubatan (lihat ms 207E, 208A–B).

Obiter:

(1) Mungkin terdapat kes-kes khusus di mana satu inferens sebab mengapa terjadinya kejadian tersebut boleh disimpulkan secara mudah terhadap seorang defendan yang memerlukan satu penjelasan daripadanya. Dalam hal keadaan sedemikian, ia mungkin mengikut aturan bagi sesuatu mahkamah merujuk kepada defendan untuk mendapatkan satu penjelasan munasabah untuk membatalkan sebab mengapa terjadinya kejadian tersebut. Ini bukannya suatu peraturan undang-undang tetapi cuma satu peraturan akal fikiran (lihat ms 202F–G).

(2) Dalam amalan, didapati ianya amat sukar untuk mendapatkan seorang doktor untuk memberikan keterangan terhadap seorang doktor yang lain. Ia menjadi isu yang diketahui ramai bahawa doktor-doktor di negara ini enggan menjadi saksi terhadap saudara perubatan mereka (lihat ms 206H).

Notes

For cases on judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2447–2720.

For cases on application for particulars generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3216–3227.

For cases on facts not pleaded in pleadings, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3534–3536.

For cases on expert witness, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2129–2130.

For cases on negligence of medical practitioners generally, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1324–1333.

Cases referred to

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 (folld)

Chin Keow v Government of Malaysia & Anor [1967] 2 MLJ 45 (refd)

F v R [1984] 33 SASR 189 (refd)

McGhee v National Coal Board [1972] 3 All ER 1008 (refd)

Naxakis v Western General Hospital [1999] HCA 22 (Internet Ed) (refd)

Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403 (refd)

Penny v East Kent Health Authority [1999] Butterworths Direct Online Service Official Transcripts (refd)

Rogers v Whitaker [1992] 109 ALR 625 (refd)

The Eurymedon [1942] 73 Lloyd's LR 217 (refd)

Wilsher v Essex Area Health Authority [1988] 1 All ER 860 (refd)

Wong Chong Chow v Pan-Malaysia Cement Works Berhad [1980] 2 MLJ 75 (refd)

Appeal from: No S5–53–13 of 1987 (High Court, Kuala Lumpur)

PS Ranjan (*MS Dhillon* with him) (*PS Ranjan & Co*) for the appellant in Civil Appeal No W–02–281 of 1999.

S Kanagasabapathi (*S Suresh* with him) (*RK Nathan & Co*) for the first respondent in Civil Appeal No W–02–281 of 1999.

GL Ambrose (*Chooi & Co*) for the second respondent in Civil Appeal No W–02–281 of 1999.

GL Ambrose (*Chooi & Co*) for the appellant in Civil Appeal No W–02–344 of 1999.

S Kanagasabapathi (*S Suresh* with him) (*RK Nathan & Co*) for the first respondent in Civil Appeal No W–02–344 of 1999.

PS Ranjan (*MS Dhillon* with him) (*PS Ranjan & Co*) for the second respondent in Civil Appeal No W–02–344 of 1999.

Gopal Sri Ram JCA. (delivering judgment of the court): There are two appeals before us here. They relate to a case of alleged medical negligence. It is a sad story, but it must be told. The plaintiff is a bright young lady. But she is confined to a wheelchair. This is how it happened.

At about 10pm on the night of 11 July 1982, the motor car in which she was traveling as a passenger crashed into a tree. It was near the Assunta Hospital ('the Hospital'). The plaintiff displayed much courage. She helped the other occupants of the car. Soon after, she admitted herself into the Hospital. The plaintiff was injured in the accident. The injuries she suffered included a closed dislocation of the C4 and C5 vertebrae. She complained of pain in her neck when she moved her head. X-rays were taken. The plaintiff was attended to by a Dr Pereira who fitted her with a surgical collar and advised her not to move her head. Dr Pereira then communicated with Dr Soo, the orthopaedic surgeon. Dr Soo advised that the collar was to be continued to be fitted and that the plaintiff was to be kept in bed with sandbags around her head to minimize movement. This was to reduce the risk of paralysis.

At about 8.30am on the following morning, Dr Soo saw the plaintiff. After a brief physical examination, he placed the plaintiff on traction. There is a dispute about how long the traction lasted, but I do not regard this to be of any great importance. What is certain is that on 13 July 1982, the plaintiff gave her consent for a closed reduction procedure. On 14 July 1982, Dr Soo attempted closed reduction under general anaesthetic. Despite three attempts it produced no success.

Then on 15 July 1982, Dr Soo obtained the plaintiff's consent to perform an open reduction on her. That procedure was carried out on 19 July 1982. The nape of the plaintiff's neck was surgically opened. The dislocated vertebrae were moved to their original positions. A wire was then inserted to lend stability to the cervical spine. Dr Soo gave evidence that he inserted the wire under the laminar. According to Dato (Dr) Arumugasamy, the expert called by the plaintiff, the correct procedure was to insert the wire in this fashion. X-rays were taken after surgery. They were not however produced at the trial, with a consequence I will refer to later in this judgment.

Unfortunately, the plaintiff became paralyzed the day after this surgical procedure was performed on her. Dr Soo obviously suspected that the paralysis was caused by vascular infarction because he prescribed a course of medication for it over four days. On the morning of 5 August 1982, a myelogram was done by the late Dr Mohandas. He found a block in the C4 to C5 vertebrae. On the afternoon of the same day, a second operation was performed on the plaintiff by Dr Soo. The wire that been placed below the laminar was removed. But the paralysis did not improve. The plaintiff did nothing for about five years. And it was only on 8 January 1987 that she caused a writ to be issued against Dr Soo and the Hospital, claiming damages for negligently injuring her.

The substance of the plaintiff's complaint appears from the particulars of negligence set out in her pleaded case. Since they are important, I will reproduce them in full. This is what she says:

(a) Failing to exercise a fair, reasonable and competent degree of care and skill in the performance of the said operation and the further operation;

(b) failing to exercise reasonable care and skill in the use of surgical instruments resulting in severe damage to the plaintiff's spinal cord;

(c) operating on the plaintiff with such surgical methods and in such manner which resulted in severe damage to the plaintiff's spinal cord;

(d) wrongly advising the plaintiff to undergo the said operation and the second operation, which no doctor of reasonable skill and competence would have advised to undergo the same;

(e) conducting the said operation and the second operation in a negligent and incompetent manner by the second defendant who was not trained nor qualified to perform the same;

(f) failing to provide post-operative care to the plaintiff to bring about her full and complete recovery and to restore her to normal physical well being and health;

(g) in all circumstances of the case, the second defendant whilst acting as servant and or agent or employee of the first defendant, failed to exercise reasonable skill and competence as was expected of a medical practitioner of his calling in the said operation and the further operation, thus causing severe damage to the plaintiff's spinal cord.

In so far as it may be necessary, the plaintiff will invoke the doctrine of *res ipsa loquitor*.

There are two points that arise from these particulars. The first point is one that I will deal with straightaway. The second is a matter that I will address later in this judgment. Let me take the first point.

These are particulars of the most general nature. It therefore comes as no surprise that the solicitors for Dr Soo, after delivering a holding defence, took out an application for particulars. Their summons is dated 29 July 1987, and although made returnable on 24 September 1987, it was never actually heard and disposed of. Consequently, when the suit came up for trial in February 1995, Dr Soo's pleaded case was far from complete. In fact, it appears from the record of appeal that the suit was called up on 13 February, on which date the learned judge appears to have given

directions for the plaintiff to deliver a single particular of her statement of claim. But Dr Soo's summons for particulars laid in the file without being disposed of, and an application by his counsel to amend the holding defence was vigorously opposed and dismissed. With respect, I find the way in which this case was handled by the learned trial judge to be an extreme example of procedural unfairness and oppression.

Nothing is clearer in adjectival law than a litigant's right to have his interlocutory applications heard and dealt with. In the present case for instance, Dr Soo had a legitimate expectation to have his application for particulars heard and determined according to law. If he was unhappy with any decision made in respect of his application, he was entitled to appeal. The failure of the High Court to hear and determine Dr Soo's application for particulars therefore occasioned a most serious and fundamental miscarriage of justice. It not only deprived him of his basic right to have his application heard, but it also deprived him of the substantive and valuable right to appeal against any decision made against him. By refusing to determine his application, the High Court effectively precluded him from going further: no decision and so no appeal. To add insult to injury, a perfectly legitimate application by Dr Soo to amend his defence was dismissed with an unusual order that he pays the costs in any event. In these circumstances, who can blame his counsel for the complaint he so legitimately made to us at the outset of the hearing of this appeal about the way in which his client's case was treated by the trial court? The effort of the plaintiff's counsel to justify what happened in the High Court cannot wash away the harm occasioned in this case.

When reading the record and arguments in this case for the purpose of writing this judgment, my first reaction was to order a re-trial before another judge. But, having re-read the printed evidence and the line of authorities that govern this case, I am satisfied that justice will be better served if this court determines this case on its merits.

To recapitulate, the plaintiff's case is that she suffered paralysis because of Dr Soo's negligence. Dr Soo had denied this, both in his pleaded case and in his evidence. Additionally, he pointed to another possible cause for her malady. The burden of establishing Dr Soo's negligence therefore lies in the ordinary way on the plaintiff. The judge held that she had succeeded in establishing this. His findings have, however, been attacked by counsel for Dr Soo and by counsel for the Hospital. The case has been argued to the point of exhaustion on all sides. But despite the many days of advocacy to which we have been subjected, I am satisfied that this is a tolerably plain case that has to do with causation. In other words, what caused the paralysis? Was it something that Dr Soo did or did not do? Or was there some other cause? These are the questions with which this case is concerned about. I recognize the essential question as being one resting on inferences to be proved from evidence accepted by the judge as being credible and from evidence admitted by the parties to be true. The conclusions of fact reached by the learned judge are therefore entitled to great weight and I must defer to him, save where it is demonstrated to a conviction that he cannot be correct.

In support of the approach I propose to take, it is not necessary to do more than refer to two authorities. The first is *The Eurymedon* [1942] 73 Lloyd's LR 217, where Viscount Simon, on behalf of the majority said:

> The appellants, therefore, start in this house under the considerable handicap that there are concurrent findings of fact against them. [Which is not the case here.] I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us in overthrowing what has already been decided. If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view — in these mundane happenings there is no more conclusive argument than non est credendum quia impossibile. If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.
>
> If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed.

The dissenting speech of Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at p 430 is equally instructive:

> The function of the Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment on favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour but the fact the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

In a case like the present, the burden of proving causation remains throughout on the plaintiff. But there may be particular cases where an inference of causation may be readily drawn against a defendant warranting an explanation from him. In those circumstances, it may be entirely proper for the court to look to the defendant for a reasonable explanation negativing causation. This is not a rule of law but a mere rule of common sense. *McGhee v National Coal Board* [1972] 3 All ER 1008 illustrates the point.

In that case, the pursuer worked in a brick kiln. The hot and dusty conditions of his work place caused the brick dust to adhere to his sweaty skin. No breach of duty by his employers, the defenders, was established in respect of his working conditions. However, the employers were held to be at fault in failing to provide adequate washing facilities which resulted in the pursuer having to cycle home after work with his body still caked in brick dust. The pursuer contracted dermatitis and the evidence that this was caused by the brick dust was accepted. Brick dust adhering to the skin was a recognized cause of industrial dermatitis, and the provision of showers to remove it after work was a usual precaution to minimize the risk of the

disease. The precise mechanism of causation of the disease however, was not known and the furthest the doctors called for the pursuer were able to go was to say that the provision of showers would have materially reduced the risk of dermatitis. They were unable to say that it would probably have prevented the disease.

The pursuer failed before the Lord Ordinary and the First Division of the Court of Session on the ground that he had proved causation. On further appeal, the House of Lords reversed. Lord Wilberforce said (at p 1012):

> But the question remains whether a purser must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the pursuer, on whom the onus lies, should fail — a logic which dictated the judgments below. The question is whether we should be satisfied in factual situations like the present, with this logical approach. In my opinion, there are further considerations of importance. First, it is a sound principle that where a person has, by breach of duty of care, created a risk, the loss should be borne by him unless he shows that it had some other cause. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In may cases of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers should suffer from this inherent evidential difficulty, the answer as a matter in policy or justice should be that it is the creator of the risk who, ex hypothesi, must be taken to have foreseen the possibility of damage, who should bear its consequences.

For some time after, this observation of Lord Wilberforce was treated as though it was a direction of law. That was a misconception. Lord Bridge put an end to it in *Wilsher v Essex Area Health Authority* [1988] 1 All ER 860. That was a case of medical negligence as well. Its facts were as follows:

The plaintiff, an infant, was prematurely born. He suffered from various illnesses including oxygen deficiency. A catheter was twice inserted into a vein of the plaintiff rather than an artery. On both occasions the plaintiff was given excess oxygen. The plaintiff was later discovered to be suffering from an incurable condition of the retina resulting in near blindness. The plaintiff's retinal condition could have been caused by excess oxygen, but it also occurred in premature babies who were not given oxygen but who suffered from five other conditions common in premature babies, and all of which had afflicted the plaintiff. The plaintiff brought an action against the health authority claiming damages for negligence and alleging that the excess oxygen in his bloodstream had caused his retinal condition. The medical evidence led at the trial was inconclusive whether

the excess oxygen had caused or materially contributed to the plaintiff's retinal condition. The trial judge held for the plaintiff on the ground that Hospital had failed to take proper precautions to prevent excess oxygen being administered to the plaintiff. He went on to hold that the burden lay on the health authority to show that there was no breach of duty, as well as showing that the damage did not result from the breach. The Court of Appeal affirmed his decision. The defendant health authority then appealed further and the House of Lords reversed.

Lord Bridge, after reviewing several authorities on the topic of causation said (at p 881):

> The conclusion I draw from these passages is that *McGhee v National Coal Board* laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of face that the defender's negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and the attempt to extract form it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

In a later passage (at p 882) he said:

> Since, on this view, the appeal must, in any event, be allowed, it is not strictly necessary to decide whether it was open to the Court of Appeal to resolve one of the conflicts between the experts which the judge left unresolved and to find that the oxygen administered to Martin in consequence of the misleading PO_2 levels derived form the misplaced catheter was capable of having caused or materially contributed to his RLF. I very well understand the anxiety of the majority to avoid the necessity for ordering a retrial if that was at all possible. But, having accepted, as your Lordships and counsel have and to accept, as your Lordships and counsel have had to accept, that the primary conflict of opinion between the experts whether excessive oxygen in the first two days of life probably did cause or materially contribute to Martin's RLF cannot be resolved by reading the transcript, I doubt, with all respect, if the Court of Appeal was entitled to try to resolve the secondary conflict whether it could have done so. Where expert witnesses are radically at issue about complex technical questions within their own filed and are examined and cross-examined at length about their conflicting theories, I believe that the judge's advantage in seeing them and hearing them is scarcely less important than when he has to resolve some conflict of primary fact between lay witnesses in purely mundane matters. So here, in the absence of relevant findings of fact by the judge, there was really no alternative to a retrial. At all events, the judge who retries the issue of causation should approach it with an entirely open mind uninfluenced by any view of the facts bearing on causation expressed in the Court of Appeal.
>
> To have to order a retrial is a highly unsatisfactory result and one cannot help feeling the profoundest sympathy for Martin and his family that the outcome is once again in doubt and that this litigation may have to drag on. Many may feel that such a result serves only to highlight the shortcomings of a system in which the victim of some grievous misfortune will recover

substantial compensation or none at all according to the unpredictable hazards of the forensic process. But, whether we like it or not, the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort. We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases.

Unlike *Wilsher*, the present case involves no question of sharp conflicts between the medical evidence led by the plaintiff and the defendant. On the contrary, the plaintiff's medical evidence, when placed at its highest, merely renders uncertain the cause for her tragic condition. To establish the point I am making, let me quote from the evidence under cross-examination of Dato (Dr) Arumugasamy, one of our most respected medical practitioners:

Q: When there is delayed onset of paralysis does it coincide with vascular infarction?

A: It is.

Q: Vascular infarction may arise out of something not connected to surgery.

A: Yes.

Q: Delayed onset of paralysis is not consistent with surgical to the spinal cord?

A: Yes, provided no vascular injury occurred during the surgery.

The point sought to be established by counsel for Dr Soo through these questions is fairly obvious. It is based on the fact that the plaintiff's onset of paralysis having come twenty four hours after the first surgery, may well have not been caused by medical negligence. Once that point had been made, it was incumbent upon the learned trial judge to determine causation. But I am unable to find, in his written judgment delivered some four years after the conclusion of the trial, any direction on the burden of proof of causation that lay upon the plaintiff. Instead, the trial judge's attention was diverted to evidence of the x-rays of the plaintiff that were not produced by the Hospital. An explanation was given by Dr Soo and the Hospital, but the learned judge apparently, on a misreading of the documentary evidence, laid the blame for the missing x-rays at Dr Soo's door. No greater injustice could have been done. Having scrutinized the evidence relied on by the learned judge, I am entirely satisfied that he mistook Dr Soo as being responsible for the missing x-rays. Nothing could be further from the truth. The evidence clearly shows that it was the Hospital that had custody of the x-rays, and that Dr Soo was not involved in any surreptitious conduct to destroy them.

There are four other matters in this appeal that call for attention. The first of these is the four year delay by the judge to deliver his judgment. There is little doubt that such a long delay as this has the effect of diminishing the weight that this court normally lends to the views upon the credibility of witnesses made by a trial court. The longer the delay in delivery of a judgment after trial, the less weight the views of the trial judge are entitled to. In civil cases, the point is illustrated by the decision of the Federal Court in *Wong Chong Chow v Pan-Malaysian Cement Works Berhad*

[1980] 2 MLJ 75, a case where the trial judge took five years to deliver judgment. Chang Min Tat FJ said (at p 77):

> Insofar as this conclusion of the learned judge is a finding of fact on the oral evidence set in the appearance and demeanour of the witnesses before him, this court must remember that it should not without sufficient reason differ. But it is equally clear that where the learned judge had not considered all the evidence and had not given to each bit its probative value, then his conclusion must be reviewed and the duty is on the appellate court to consider whether his conclusion can on the whole be upheld. In this case, it seems to us that any value that may properly be placed on the learned judge's appreciation of the witnesses must be greatly diminished in the considerable time that had elapsed from their appearance before him to his writing out his judgment.

Accordingly, this is a case where appellate intervention is more readily available than in an ordinary case where the rule of audiovisual advantage would apply to protect the findings of fact by a trial judge from appellate interference. This necessarily ties up with what I earlier said in relation to the function of this court in relation to appeals against questions of fact.

Counsel on both sides have painstakingly taken us through several passage in the evidence and the judgment of the learned trial judge. I do not think that any useful purpose is to be served by my regurgitating these here. Suffice to say that it has been demonstrated that on more than one occasion, the learned judge either misunderstood the evidence or drew inferences from it that were plainly unwarranted. An example of this relates to the loss of the x-rays to which I have adverted earlier.

The second matter relates to the plaintiff's pleaded case. To recall, the particulars pleaded by the plaintiff pointed to negligence on the part of Dr Soo in using surgical instruments during the surgical procedure. The notes of the evidence recorded by the learned judge therefore shows Dr Soo's counsel directing his questions along these lines to meet the plaintiff's pleaded case.

However, during the course of the trial, a far more wide-ranging attack of an unpleaded case of negligence was raised against Dr Soo and the Hospital. Hence, it is not without justification that counsel for Dr Soo complained before us that he and his client were taken by surprise at the course along which the trial proceeded. Needless to say that both Dr Soo and the Hospital suffered serious prejudice by reason of having to meet unpleaded charges of negligence.

Counsel for the plaintiff has sought to defend his position by relying on the usual difficulty that a plaintiff in a medical negligence case faces in trying to prove negligence against a doctor. In practice, one finds it most difficult to get one doctor to testify against another. In fact, it is a matter of notorious repute that doctors in this country make the most reluctant witnesses against their brethren. But in the present case, it appears that the plaintiff had the benefit of the advice of Dato (Dr) Arumugasamy. It was therefore open to her in the usual way to administer interrogatories to the defendants to ascertain what, if anything, had been done wrong during surgery. The plaintiff can scarcely complain now for the failure of her solicitors to resort

to the several procedural lines of attack provided to a litigant by rules of court.

The third point has to do with the treatment meted out to the expert called by Dr Soo. I do not propose to delve into details. I will merely say that neither the treatment meted out to the defence expert witness during the course of the proceedings, nor the adverse comment made by the learned judge in his judgment was warranted. The main source of complaint against the defence expert is that his evidence was based on a reading of the plaintiff's evidence and that of her expert given during the trial. Quite frankly, I am unable to see anything wrong with this whatsoever. From my own experience at the Bar, it is a common occurrence for experts on one side to be present in court during the evidence of the other side. This is to enable the expert not only to advice counsel during cross-examination but also to be able to comment on the expert evidence of other side when he in turn gives evidence. It avoids surprise and delay. If, for any reason, an expert is unable to be present when the other side is giving evidence, it is perfectly proper for him or her to later study the notes of the evidence to ascertain the nature of the evidence given. Dr Soo's expert did just this. Yet, he and counsel for Dr Soo received biting criticism from counsel for the plaintiff and the trial judge, both of whom I presume were unfamiliar with the normal practice and procedure that is followed in cases where experts give their evidence.

The fourth and final point I propose to deal with is the standard of proof of medical negligence. The test that we have always used in our jurisdiction is that formulated by McNair J in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. To recall, this is what he there said at p 586:

> Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

Indeed, the Privy Council in an appeal from our courts applied this statement (see *Chin Keow v Government of Malaysia & Anor* [1967] 2 MLJ 45). To the list of cases that have explained the applicability of the *Bolam* test, may be added the instructive judgment of Lord Woolf MR in *Penny v East Kent Health Authority* [1999] Butterworths Direct Online Service Official Transcripts.

In the course of argument, we were referred to a number of recent cases from Australia that have departed from the *Bolam* test. These include *F v R* [1984] 33 SASR 189, *Rogers v Whitaker* [1992] 109 ALR 625 and *Naxakis v Western General Hospital* [1999] HCA 22 (Internet Ed). Counsel for the plaintiff urged us to follow the Australian approach and jettison the *Bolam* test. I will be less than frank if I did not say that I was at first most attracted to this suggestion. But having given the matter much anxious consideration, I have come to the conclusion that we ought not alter the approach. There

are two broad reasons for this. First, as a matter of precedent, I do not think that it is open to us, as an intermediate court of appeal, to alter the law. That is a function reserved for the apex court. Secondly, as a matter of practical justice, the *Bolam* test places a fairly high threshold for a plaintiff to cross in an action for medical negligence. It is right that this be so. If the law played too interventionist a role in the field of medical negligence, it will lead to the practice of defensive medicine. The cost of medical care for the man on the street would become prohibitive without being necessarily beneficial. For the time being the *Bolam* test maintains a fair balance between law and medicine. There may perhaps come a time when we will be compelled to lower the intervention threshold if there is a continuing slide in medical standards. But that day has not yet come.

Having reviewed the evidence with utmost care, and having considered the arguments of counsel, I am satisfied that this is a proper case for us to intervene. For the reasons already given, I would allow Dr Soo's appeal. Since the Hospital's case hinges on the result of Dr Soo's appeal, it succeeds as well. Both appeals are therefore allowed. The orders of the trial judge are set aside. The plaintiff must bear the costs of both appeals and of the trial. The deposit in court will be refunded to the respective appellants.

My learned brothers Haidar Mohd Noor JCA and Azmel Maamor J have read this judgment in draft and have expressed their agreement with it.

Both Dr Soo's and the Hospital's appeals allowed.

Reported by Andrew Christopher Simon